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IN THE

Supreme Court of the United States

October Term, 1966.

No. 29.

Z. T. OSBORN, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF FOR THE PETITIONER.

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OPINION BELOW.

The opinion of the court below (R. 47-66) is reported at 350 F. 2d 497.

JURISDICTION.

The judgment of the court below (R. 66-67) was entered on August 27, 1965. A timely petition for rehearing was denied on October 8, 1965 (R. 67). The petition for certiorari was filed on November 5, 1965 and granted on January 31, 1966 (R. 68). The jurisdiction of this Court rests on 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether a conviction can be sustained where the most telling evidence against the petitioner consisted of the recording of his conversation with an informer, not known by the petitioner to be such, which was obtained by means of a device concealed on the informer, who was sent with such equipment to the petitioner's office by two United States District Judges in order to record his conversation with the petitioner, and where these judges testified at the trial that this was done to determine the truth.

2. Whether obtaining the recording of a conversation by a concealed device carried on the person without the knowledge of the individual to whom the carrier of the device is talking constitutes an unreasonable search and seizure in violation of the Fourth Amendment and in violation of petitioner's rights under the Fifth Amendment.

3. Whether *Olmstead v. United States,* 277 U. S. 438, and its progeny, *On Lee v. United States,* 343 U. S. 747, and *Lopez v. United States,* 373 U. S. 427, should now be overruled.

4. Whether the court should have decided the issue of entrapment under the facts of this case because of the conduct of the Government and the acquittal of petitioner on another count of the indictment used as the basis to show predisposition.

5. Whether it was prejudicial error for the trial court to instruct the jury that if they found the tape recording was legally obtained they should find there was no entrapment and return a verdict of guilty.

6. Whether it was prejudicial error to permit the two district judges to testify that they authorized sending Vick to petitioner equipped with a tape recorder and to receive in evidence Vick's affidavit.

7. Whether the conduct attributed to the petitioner constituted a violation of Section 1503, Title 18 U. S. C.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The Fourth Amendment to the Constitution declares that:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment provides in pertinent part:

> "* * * nor shall any person * * * be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law * * *."

Section 1503, Title 18 U. S. C., provides in pertinent part:

> "Whoever * * * corruptly * * * influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

STATEMENT.

Petitioner was sentenced to three and a half years' confinement and a fine of $5,000, following his conviction by a jury on one count of a three-count indictment alleging violations of 18 U. S. C. § 1503; the court below affirmed.

A. The Indictment.

Count One of the indictment charged that petitioner in November 1963 "did request, counsel, and direct" one Robert D. Vick to contact Ralph A. Elliott, who was and known to be a member of the petit jury panel from which jurors were to be drawn for a pending case, "and to offer and promise to pay the said Ralph A. Elliott $10,000 to induce the said Elliott to vote for an acquittal" if Elliott were to be selected as a juror for that trial, this in violation of 18 U. S. C. § 1503 (R. 7a).

Count Two charged a similar offense in November 1962 in respect of an earlier trial, the request being alleged to have been made to one Beard to approach D. M. Harrison who was the husband of a sitting juror (R. 8a).

Count Three charged a similar offense in November 1962 in respect of the same earlier trial, the request being alleged to have been made to one Polk to attempt to arrange a meeting with Virgil Rye, who was the husband of a sitting juror.

Count Three was dismissed by the prosecution before trial (R. 154a), and petitioner was acquitted on Count Two (R. 735a). Accordingly, the statement that follows deals with the facts bearing on the first count, and is restricted, in view of the contentions made, to

the evidence adduced by the prosecution. Only occasionally, to show that a particular matter is undisputed, will reference be made to testimony adduced by the defense.

B. Petitioner's Position; His Employment of Vick.

This petitioner was one of the attorneys for the defendant James R. Hoffa, in the prosecution of the latter charging jury tampering that was pending in the Nashville Division of the Middle District of Tennessee, until that case was transferred to the Eastern District after Judge Gray recused himself (R. 155a-157a; Govt. Exs. 5-7). That indictment was returned on May 9, 1963, and the transfer took place on December 28 of the same year (R. 155a). Petitioner had earlier been counsel for Hoffa in a substantive prosecution that had commenced in October 1962 and was terminated by a mistrial in December 1962 (R. 123a; Govt. Exs. 1-4).

In connection with the first trial about October 16, 1962, petitioner had employed one Robert D. Vick and others to make background investigations of prospective jurors with respect to race, religion, and employment (R. 158a, 192a, 193a, 218a, 219a). At that time, Vick was a Deputy Sheriff who conducted spare time investigations for lawyers (R. 217a-218a). Vick lost his job as a Deputy Sheriff, but in November 1962 became a member of the Nashville Police Department. A merger of Nashville and Davidson County Government was voted and Vick became fearful that he might not be able to keep his job when his department was to be merged with the sheriff's office, because in making juror investigations for Hoffa's lawyer he had come under the Hoffa stigma (R. 214a, 220a, 221a, 224a, 225a).

In October 1963, pretending to fear loss of his job (R. 220a-221a, 231a-232a) and needing money (R. 225a-226a, 259a-269a, 273a), Vick several times begged petitioner for further employment (R. 225a, 259a-260a; *accord,* R. 129a). Petitioner re-employed Vick for background investigations of jurors (R. 197a-198a) on October 28. Vick telephoned "this fact" to Sheridan, Government agent, the same day (R. 653a).

C. Vick's Status as a Federal Informer.

At the time of the matters alleged in the indictment, Vick was, unbeknownst to petitioner (R. 139a), working for the United States Government (R. 139a) as an informer, although not formally an employee (R. 163a-165a); his mission was to report "illegal activity" to the F. B. I. (R. 165a, 166a, 167a, 216a, 225a, 226a, 273a; cf. R. 135a); he had offered to make any information he might obtain available to the F. B. I., and he desired an arrangement with the Government wherein he would be protected from prosecution in return for furnishing information (R. 257a-258a). Vick sought such an arrangement because, having lost his job in the sheriff's office, he wanted a "clean bill of health" from the Department of Justice (R. 215a, 220a, 225a-226a).

The time when Vick became a Federal informer was not clarified until his statements to the prosecution were made available to the defense under the *Jencks* rule.

Agent Sheridan said he first met Vick in July or August 1963 (R. 162a-163a). Called as a defense witness on the motion to suppress (R. 128a-142a), Vick said he talked to Sheridan in August (R. 141a), but insisted that he had no connection with the Depart-

ment of Justice until November (R. 142a). Testifying as a witness for the prosecution, Vick denied that he had become a Government agent in May 1963 (R. 227a), and said he only became one in July (R. 228a).

After the defense had been furnished his earlier statements, Vick admitted that his first report to the F. B. I. had been made on February 24, 1963 (R. 253a), and that he had made another report to the F. B. I. on June 14, at which time he had told them that he wished to work for petitioner, but also desired an arrangement whereby he would be protected from prosecution in return for furnishing information (R. 250a-251a; *accord,* R. 257a-258a). Then (R. 252a)—

> "Q. Well, why did you tell us then that you had never made any offer to inform, this morning, before July?
>
> "A. Well, I didn't intend to tell you that, Mr. Norman [defense counsel], if I did."

The testimony of the petitioner Osborn corroborated Vick's evidence that Osborn had no inkling of Vick's status as a Federal informer (R. 449a, 456a, 457a, 463a).

Since the date of the matters alleged in the indictment, Vick, although paid by the Nashville Police Department, had done no work for them, but had been on special assignment for the Federal government (R. 192a, 231a-233a; *accord,* R. 128a-129a).

D. Vick's Proposal to the Petitioner.

On October 28, 1963, Vick was hired to make background investigations of prospective jurors for petitioner. Vick did not attempt to record any conversations between October 28 and November 7, 1963.

Vick testified that on November 7 he "got into a discussion of the jury panel" (R. 654a) with petitioner and told him that his cousin, Elliott, was on the jury (R. 200a-201a). According to Vick, petitioner then asked Vick to see Elliott (R. 203a-204a).

After reporting this conversation to Sheridan, who had told Vick that he would like Vick to represent him (R. 166a), Vick returned to petitioner on the next day, saying that he had seen Elliott and that Elliott was susceptible to hanging the Hoffa jury (R. 206a). In fact, Vick had not seen Elliott (R. 206a); when Vick told Petitioner "I have been to see him," that was all a lie (R. 264a)—and Vick had never intended to talk to or get in touch with Elliott (R. 260a; *accord,* R. 132a, 135a, 138a-140a). Nothing had happened, the whole matter was Vick's pretense to petitioner (R. 260a; *accord,* R. 135a). Further (Vick on cross-examination, R. 263a):

> "Q. But you did pretend to Tommy Osborn you would go to Mr. Elliott?
>
> "A. Yes, sir, I did.
>
> "Q. Could never any harm there come out of it. You of course knew it at the beginning, didn't you?
>
> "A. No intention whatever.
>
> "Q. No intention whatever. So the only purpose was to lie to Osborn into believing you would, wasn't it?
>
> "A. I suppose that is correct.
>
> "Q. So, in order to build that a little stronger, to suck him in a little further, you then went back and told Osborn you saw Elliott?
>
> "A. Yes.
>
> "Q. And did you suck him in, did you?
>
> "A. No, sir.

"Q. Why did——?

"A. The Department of Justice was trying to discover evidence of an effort at jury tampering, and I did go to see him.

"Q. It was false?

"A. Didn't intend to suck him in.

"Q. It was false?

"A. Yes.

"Q. But you told Osborn you had seen him?

"A. Yes, sir.

"Q. Well, the reason was to suck him in?

"A. Find out what he was going to do.

"Q. Find out what he was going to do?

"A. In fact, the Department of Justice didn't really believe we had had this conversation."

Vick "was trying to find out what Mr. Osborn's intentions were" (R. 265a), although he, Vick, admitted that he did not intend to ever do anything about it (R. 265a). "It was necessary—nobody believed that Mr. Osborn was attempting to tamper with the jury—the juror. It was necessary to go through with this in order to prove this" (R. 266a). Further (still Vick on cross-examination, R. 266a-267a):

"Q. Yes. So your idea and your purpose was to get Mr. Osborn to follow your pretense, then? That right?

"A. No, sir.

"Q. Isn't that what you just said?

"A. I was trying to find out what Mr. Osborn's intentions were and prove it, and make a case, Mr. Norman.

"Q. Make a case?

"A. Yes, sir.

"Q. In other words, you were trying to make a case on him?

"A. I am a policeman, and you know this."

After Vick in his second conversation with petitioner had stated that "Elliott was susceptible to money for hanging this jury in this tampering case * * * against Hoffa" (R. 206a), petitioner according to Vick offered $5,000 for Elliott when and if he got on the jury, and $5,000 more after the trial, and that he should hold out for acquittal all the way (R. 206a-207a). Vick reported this conversation (R. 208a).

The record shows that, *before* Vick told Osborn that Elliott was a cousin of his, on October 21, 1963, he had advised Sheridan of that fact (R. 349a).

The record also shows that in September 1963, *before* being employed by petitioner for the final work to be performed by Vick, and during the period when the work theretofore done by Vick was being done by others, Vick *on his own* obtained a copy of the jury list from the courthouse and went to a Nashville lawyer named Samuel Eugene Wallace (R. 269a, 576a-580a). He told Wallace he had a cousin on the jury and asked Wallace whether he thought a juror would be worth $50,000 to Hoffa; questioned as to this Vick answered "I don't know I could very well have done it. Mr. Wallace and I have discussed this" (R. 269a). The question was repeated after objection and discussion (R. 271a): "Now what do you say about it?" Vick said, "Now I say that I was trying to find out whether Mr. Wallace had any connection with the Hoffa case. He had said to me he had not. And perhaps I made some statement to find out whether he would have some connection there or not . . .

"Q. Do I understand you now to say you were trying to trap Mr. Wallace in something?

"A. No, sir, I was trying to find out . . ." (R. 271a)

E. Use by Vick of a Concealed Tape Recorder Authorized by Both United States District Judges.

Vick made an affidavit covering his first conversation with petitioner concerning Elliott (R. 201a; Govt. Ex. 17, R. 653a-655a). This was made available to the two United District Judges for the Middle District of Tennessee (R. 383a) who then (R. 383a) "authorized further investigation of the matter including, specifically, an authorization for the Department of Justice to send Robert D. Vick back to talk with [Osborn] equipped with a tape recorder." The prosecutor stated that "The government did not do that on its own" (R. 408a).

The record shows that, unknown to petitioner (as indeed the prosecution admitted at the trial, R. 172a) Vick made three trips to petitioner's office with a tape recorder on his person which he could turn off or on (R. 176a).

The first such trip took place on November 8, 1963 (R. 176a, 202a); on this occasion the recorder did not function (R. 178a, 204a). A second trip was made on the following day (R. 205a); but appellant was not in the office. Finally, on November 11, when Vick made a third trip to discuss Elliott with petitioner (R. 180a-181a, 205a), the tape recorder worked. The tape was sent to the F. B. I. laboratory in Washington (R. 181a), where a filtered copy was made (R. 182a, 414a). The original tape was admitted as Govt. Ex. 10 (R. 183a), the filtered copy as Govt. Ex. 11 (R. 183a-184a), and the transcription as Govt. Ex. 12 (R. 184a-185a).

Both participants in the conversation, as well as the F. B. I. agent, agreed that the transcription accurately recorded the conversation (R. 184a-185a, 210a, 426a).

That conversation had petitioner discussing with Vick means of reaching Elliott and offering to pay him money to hang the jury (R. 532a-541a, 544a-547a, 548a, 553a); it is set forth in full in the opinion of the court below (R. 49-56). There were no other recordings.

F. Confrontation and Disbarment.

Petitioner on three separate occasions prior to the return of the indictment herein appeared before judges of the Middle District of Tennessee in respect of the matters alleged in that indictment.

On November 15, 1963, he appeared alone before Judges Gray and Miller. He waived counsel. Being told that there was substantial information to show his personal implication in a plan to contact and improperly influence a juror named Elliott, he denied generally any plan or efforts to tamper with or improperly influence the jury panel that had been drawn, and denied any conversation with anyone for that purpose, specifically denying any effort to contact Elliott. He was thereupon served with an order to show cause why he should not be disbarred, which had already been prepared (R. 363a-366a; Govt. Ex. 13, R. 370a-381a).

On the next day, November 16, accompanied by two lawyers as counsel, petitioner appeared before Judge Gray to ask for the information that underlay the foregoing order to show cause. Judge Gray said that the two judges had three affidavits from Vick, that on the basis of the first one both judges had authorized Vick to take a tape recorder to record his further conversations with petitioner, and that they had the

tape recording thus made, as well as further statements and affidavits. Judge Gray refused to make the statements available to petitioner, but said that the recorded conversation showed that petitioner had authorized an improper contact with Elliott (R. 366a-367a; Govt. Ex. 14, R. 381a-384a).

A third hearing took place on November 19, 1963, before Judge Miller. Petitioner waived counsel, said he was appearing voluntarily, and denied that any promises, inducements, or representations had been made to him.

He said that he had warned Vick not to approach Elliott, that he had no plan to approach Elliott and no authorization or source of funds for any offer to him. He said that, semi-exhausted with overwork, "I walked right into the trap," and that for the same reason he was susceptible to Vick's approach.

The tape recording and numerous affidavits were at this hearing received in evidence, and F. B. I. agents Steele and Sheets testified. Petitioner waived calling or cross-examining Vick, stated that the tape recording was accurate, and insisted he was led into the entire matter by Vick (R. 367a-369a; Govt. Ex. 15, R. 385a-434a; sub-exhibits A through N to Govt. Ex. 15).

Testifying on his own behalf at the trial, petitioner admitted that he made untrue statements before Judges Gray and Miller at the first hearing because of a desire to protect Vick (R. 467a, 514a-517a), and stated, what is not in controversy, that following those hearings he was disbarred and thereafter was indicted (R. 469a). Disbarment proceedings against him in the State courts are pending but meanwhile he is not practicing law at all (R. 510a-511a).

G. Vick's Offers to Change His Testimony.

Much of Vick's cross-examination was devoted to showing that, in numerous conferences with members of the Teamsters Union, he had said that he could prove that he had entrapped Osborn (R. 283a), and that if entrapment were proved Hoffa would be out (R. 295a, 296a).

One such meeting was in Louisville, Ky. (R. 244a *et seq.*, 316a-330a), another in Indianapolis (R. 241a-243a, 315a-317a), and a third in May 1964 in the Holiday Inn Motel near or just outside Nashville (R. 275a-298a, 300a-314a, 315a). Vick's testimony regarding the purpose of the meeting varied from "I think they wanted to talk to me to try to get me to change my testimony some way" (R. 240a-241a), to an asserted effort "to find out if they were trying to get to me and who had authorized them to try" (R. 282a-283a).

In the course of these meetings, Vick kept trying to impress the Teamsters' representatives that he was a "big shot" with the Department of Justice, statements that, in addition to others made to gain their confidence, he admitted to have been completely untrue (R. 232a-236a, 246a).

Vick reached the point where he said, "You have only one problem left" (R. 306a), namely, his own payoff; in his words at the trial, "My hands were itching" (R. 306a). Pressed to make a proposition, he asked for compensation for loss of a $9,000 job for the next 20 years (R. 312a)—he was 39 years old at the time of the trial (R. 217a)—or a total of $180,000 (R. 312a), plus $36,000 to send his three sons through college at $12,000 for each (R. 311a-312a), or a price for changing his testimony in the neighborhood of $250,000 (R. 313a).

He itemized the elements making up this proposal in writing (R. 350a; Def. Ex. 2 for id.).

Vick reported to the F. B. I. that he could not make up his mind whether there had been a bona fide offer to him of $250,000 (R. 339a), and on the stand he admitted (R. 345a-346a) that "I never could get them to do anything that I thought was really an overt act, to where I could really do something about it."

What Vick did not know (R. 337a) was that in these meetings the tables were turned; this time the people talking to him were carrying a tape recorder (R. 299a). The transcription of the Holiday Inn tape recording, in the course of which he named a price in the neighborhood of a quarter of a million dollars for testifying that he entrapped Osborn (R. 300a-314a), was read to him, and he admitted it was accurate (R. 314a).

Vick's testimony admitting the statements attributed to him came after he had been told that his conversations in which these statements had been made were tape recorded. When first asked about the same statements he said that the statement had been made "jokingly, if made" (R. 228a, 233a). That he had made "a lot of joking statements" (R. 233a), "may have jokingly said "that the Government had guaranteed education of his children (R. 234a), and had made other statements "just a little jokingly" (R. 235a). Faced with a tape recording, Vick claimed to have been making an investigation. "We were trying to catch some people we thought were going to offer me a bribe . . . and told these people anything that would encourage them . . ." (R. 236a). His efforts to prove the offering of a bribe were simply efforts to try to catch "him" (R. 244a; cf. 245a, 246a, 247a).

Vick also admitted that, some years back, he had attempted to bribe a city councilman (R. 349a).

In the course of Vick's cross-examination the following took place (R. 283a):

> "Q. In other words, lying doesn't mean a thing to you?
>
> "A. If I am trying to find out information from people who are trying to get to me, no."

Vick was shown to have a bad reputation for truth and veracity (R. 600a, 602a, 604a, 606a, 608a, 609a).

H. The Rebuttal Testimony of the District Judges and the Reception in Evidence of Vick's Affidavit.

The Government was permitted, over objection, to adduce the testimony of District Judges Gray and Miller on rebuttal, after petitioner closed his defense, for the ostensible purpose of showing whether or not there was entrapment (R. 651a-652a). The testimony of the judges related the circumstances under which they authorized the tape recording by Vick, particularly concerning the fact that they had an affidavit from Vick (R. 651a-662a). Vick's affidavit, which the court had previously refused to admit into evidence (R. 407a-408a), was now received (Government Exhibit 17) over objections, and read to the jury (R. 653a-656a). The judges were permitted to express deep concern over the gravity of the offense charged (R. 657a-659a), and to voice the disbelief of the prosecutors in the charge of Vick (R. 658a, 660a). Therefore, they testified, they authorized the tape recording by Vick to determine what the truth was (R. 657a, 659a-660a). The objections of petitioner were overruled, as was his motion to strike the testimony (R. 661a-662a).

I. Petitioner's Motion to Suppress.

Petitioner filed a motion under Rule 41(e), F. R. Crim. P., to suppress the tape recording of his conversation with Vick on November 11, 1963, that Vick had obtained, and called Vick and other witnesses (R. 128a-153a). This was before Vick's *Jencks* statements had been turned over. Vick's testimony accordingly differed from what he testified to at the trial in significant particulars.

At the hearing on the motion to suppress, Vick said he had never discussed Elliott with anyone before talking to petitioner (R. 130a, 131a), specifically denying that he had discussed his relationship to Elliott with the United States Government (R. 131a); at the trial it was shown that he had informed the F. B. I. agent Sheridan of his relationship to Elliott a week before he was reemployed by petitioner (R. 348a-349a).

At the hearing on the motion to suppress, Vick said he never had any connection with the Department of Justice about his plan to supply information obtained by working for petitioner before November (R. 142a); at the trial it was shown that he had made reports to the Department in February, June, July or August, and October.

Following the hearing on the motion to suppress, and on the basis of the evidence adduced at that time, the trial judge ruled that, on the authority of the *Lopez* and *On Lee* cases [*On Lee v. United States,* 343 U. S. 747; *Lopez v. United States,* 373 U. S. 427], the tape recording was admissible; and that there was no entrapment, because Vick did not lure the petitioner into conversation but merely provided the opportunity, and because neither Vick nor the F. B. I. agents incited or created the offense (R. 153a).

J. Motion for Judgment of Acquittal.

At the conclusion of evidence of the Government's case in chief a motion for judgment of acquittal was made. ". . . and for the reason that the Government's proof shows conclusively that any actions of the defendant in this cause proven by the Government were in connection, not with any offense or violation of the law, but with regard to a pretended offense, originated, designed, prepared, mechanized, instituted and continued by agents of the United States Government, and for the reason that any connection or association with or participation in said pretended offense, or offenses, by the defendant was the result of deliberate, premeditated and detailed fashioned entrapment on the part of the agents of the United States Government." This motion was overruled (R. 435a-436a).

K. The Charge Concerning Entrapment.

In instructing the jury on the issue of entrapment, *inter alia,* the trial judge submitted as petitioner's contention that the tape recording was unlawfully obtained, and charged the jury that if they found against this contention they should find that there was no entrapment and return a verdict of guilty (R. 697a-698a).

L. The Rulings Below.

In respect of the issues on which review was granted here, the court below ruled as follows:

It held that the recording was admissible, citing, *inter alia, On Lee v. United States,* 343 U. S. 747, and *Lopez v. United States,* 373 U. S. 427, and then adding in a footnote (R. 56) that—

"In view of the strong dissent in *Lopez* (see *Lopez v. United States,* 373 U. S. at 446) to the

controlling rule described above, it may be relevant to note that the essentials of search warrant procedures were carried out in the instant case, albeit no statutory authority for such a warrant exists. These include appearance before a court, a showing of probable cause, a specific judicial authorization for the search, including a description of method and object."

On the entrapment issue, the court below quoted the entire recorded conversation, referred only glancingly to the prior conversations between Vick and the petitioner, and held that the jury was justified in finding that there was no entrapment and that the charge on entrapment was correct (R. 60-62).

The court below held further that, even though petitioner was acquitted on Count 2, the jury might still have considered the evidence pertaining to Count 2 on the issue of whether petitioner had an existing disposition to commit a similar offense, and that it was not error to refuse to instruct that the jury could not consider the testimony pertaining to Count 2 in the event that they rendered a not guilty verdict thereon (R. 65).

The court below further held that admission of the judges' testimony on rebuttal was not reversible error, and that Vick's affidavit was admissible as a prior consistent statement (R. 64-65).

Finally, the court below ruled that telling a third person to offer a bribe to a prospective juror constituted a corrupt "endeavor to influence" within 18 U. S. C. § 1503, and that "We do not believe that this act is insulated from prosecution by failure, or by lack of actual intent on the part of the third party ever to make the approach" (R. 59-60).

SUMMARY OF ARGUMENT.

I. *Olmstead v. United States,* 277 U. S. 438, *On Lee v. United States,* 343 U. S. 747, and *Lopez v. United States,* 373 U. S. 427, should be severally overruled, and the electronic recording made of petitioner's conversation should be held to have been obtained in violation of the Fourth Amendment's command against unreasonable searches and seizures. This view has had the support of many members of the Court, and need not now be further developed at length in view of the recent dissent in *Lopez.*

That case is in any event distinguishable, since there Davis was known to be a Federal officer, who explained the motive for his original visit, while here petitioner had not the slightest inkling that Vick, whom he had employed at the latter's solicitation, was in fact an F. B. I. informer wired for sound. Consequently when Vick gained access with his recorder what was recorded was illegally seized and used at the trial.

II. But even if the *Olmstead-On Lee-Lopez* line of decision stands, so that no constitutional question is involved, the recording should still be excluded, in the exercise of this Court's supervisory powers, because it was the fruit of judicial collaboration with the prosecution in the detection of crime.

Obtaining prior judicial approval for the carrying of the concealed recorder cannot be equated with search warrant procedure, first because Vick never announced the source of his authority, as officers executing search warrants invariably do; second because the results of his activities were immediately and informally disclosed to the judges in chambers rather than being submitted formally in connection with pre-

trial motions or normal trial procedure, as are the fruits of searches conducted pursuant to warrants regularly issued. Moreover, as the law stood, no imprimatur of judicial approval was necessary as a prerequisite to the admissibility of the recording.

Here there was complete confusion between the issue of illegally obtained evidence—the admissibility of the recording—and the issue of entrapment, which involved the completely unrelated question whether petitioner had acted because of the suggestions or solicitations of a Government agent. Those two issues are entirely distinct, but were improperly and erroneously intermingled throughout at the trial.

The prosecution overstepped proper limits when it showed the judges the information it had obtained and sought their approval for placing the recorder on Vick; the judges overstepped proper limits when they associated themselves with enforcement officers by authorizing and approving this further investigative step and later appearing as witnesses for the prosecution at the trial. In doing so, they stepped down from the bench into the arena.

In view of this impropriety, which strikes at the very fundamentals of judicial conduct, all evidence obtained by the prosecution in conformity with or pursuant to the judges' directions must be excluded. Judges simply have no business becoming advisers to and partners of the prosecution, a basic principle that this Court should implement by the exclusionary rule we urge.

III. The entrapment issue was erroneously handled in numerous respects.

A. To begin with, it should never have been submitted to the jury at all, on either one of two grounds.

First, there was entrapment here as a matter of law, because the record plainly shows that it was only *after* Vick, who admitted he was endeavoring to "make a case," and had sought employment with petitioner *for that sole purpose,* mentioned his cousin Elliott, that petitioner was tempted. This is plain from Vick's own testimony. What petitioner did was the product of Vick's creative activity. Because of its preoccupation with the last and recorded conversation, the court below quite failed to recognize that interchange as simply the last "part of a course of conduct which was the product of the inducement" (*Sherman v. United States,* 356 U. S. 369, 374).

Alternatively, if the rationale of the concurring opinion in *Sherman* be adopted, with its emphasis on the conduct of the police rather than on the predisposition of the accused, then there was entrapment because Vick set out to "make a case." It is an abuse of the power of government when that power is "employed to promote rather than detect crime and to bring about the downfall of those who, left to themselves, might well have obeyed the law" (*Sherman v. United States,* 356 U. S. 369, 378, 384). Police should investigate cases, not create cases.

B. Such a course is particularly indicated here, when evidence of predisposition rested on what petitioner was alleged to have done under Count Two about a year earlier—in respect of which he was acquitted. Consequently, on a retrial such evidence would be inadmissible, and as a matter of fairness petitioner is now entitled to a new trial on Count One wherein no evidence under Count Two on which he was acquitted would be competent. Of course, if the course urged by the concurring opinion in *Sherman* were adopted,

this question would not arise; predisposition would then not be in issue; only the conduct of the prosecution would then be material.

C. So much of the charge as left the jury to determine whether the tape recording was obtained by lawful means constituted plain error requiring reversal.

Not only did the trial judge leave to the jury the question of the lawfulness of the tape recording, he emphasized that the steps in this recording were "done with the specific approval of the Federal Judges of this District." Thus he confused admissibility with entrapment, improperly submitted a question of law to the jury, and then weighted it against petitioner by erroneously making it turn on the judges' prior approval.

Although not objected to, this portion of the charge was plain error; indeed, it was glaring and palpable error, and of such magnitude as to require reversal.

IV. It was additionally reversible error to permit the two judges to testify on rebuttal that they had authorized sending Vick to petitioner with a concealed recorder, and to admit Vick's affidavit as well.

Here again, there was confusion between admissibility and entrapment. None of the judges' testimony, which concerned only their authorization to Vick to carry the recorder, had the slightest bearing on whether or not there had been entrapment. *The recording was already in evidence, as well as the fact of the judges' authorization therefor.* Every word they said on the stand was plainly improper as rebuttal testimony.

Similarly, since the defense had not made the slightest suggestion that any part of Vick's lengthy testimony involved recent contrivance, Vick's affidavit, earlier excluded, was still inadmissible, since it simply

repeated what he had already said on the stand. The ruling below, that it became competent simply because he had been contradicted, is contrary to every other decision on the point.

Here the rebuttal testimony sealed petitioner's doom. It transformed what up to then had simply been a contest of veracity as to *prior unrecorded conversations* between an untrustworthy informer and a reputable professional man, because here the judges, who had already doffed the judicial robe to pin on the policeman's badge, simply gave opinion evidence of their belief in petitioner's guilt.

The details of their authorization to Vick were already in evidence. The fact that they had disbarred petitioner had similarly been made known to the jury. Yet here the judges were additionally—and improperly—permitted to tell the jury that they as judges were convinced of petitioner's guilt. The objection to their testimony should therefore have been sustained; overruling that objection requires reversal.

V. Inasmuch as Vick by his own testimony never had the slightest intention of ever approaching his cousin Elliott, anything that petitioner said to Vick was as ineffectual as if petitioner had uttered the same words to a blank wall.

Consequently this is a case of impossibility, which is well nigh universally recognized as a defense to a charge of criminal attempt, and which was specifically recognized as a defense to a violation of 18 U. S. C. § 1503 in *Ethridge v. United States,* 258 F. 2d 234 (C. A. 9).

United States v. Russell, 255 U. S. 138, is not to the contrary; that decision simply holds that "endeavor" in the statute is broader than "attempt," and

that use of the former word was designed to eliminate discussions over preparation and the like. The *Russell* case did not involve and so did not decide any issue of impossibility.

While the American Law Institute's Model Penal Code, § 5.01(1)(a), does propose to eliminate impossibility as a defense to a charge of attempt, that would change existing law, as indeed a recent case reluctantly recognizes. *Booth v. State,* 398 P. 2d 863 (Okla. Cr.).

As the law now stands, petitioner did not violate § 1503. In view of the uncontradicted proof that Vick never had the slightest intention of acting on whatever petitioner said, indeed could not since the Government had been told of Vick's relationship to this juror *before* Vick ever mentioned him to petitioner, the indictment here must be dismissed.

ARGUMENT.

This is a disturbing and deeply troubling case.

It presents once again, indeed it cries out for a re-examination of, the doctrine that holds electronic eavesdropping to be consistent with the Fourth Amendment's prohibitions against unreasonable searches and seizures. For, despite *Olmstead v. United States,* 277 U. S. 438, and its progeny, *On Lee v. United States,* 343 U. S. 747, and *Lopez v. United States,* 373 U. S. 427, the classic dissent of Mr. Justice Brandeis in *Olmstead* and his prediction of how privacy will be taken away "by a contrivance of modern science," continues to disquiet all who believe that, just as the Commerce Clause drafted in 1787 is amply broad enough to authorize the regulation of television, so the Bill of Rights adopted in 1791 protects not only against physical Eighteenth Century intrusions into the closet but also against mid-Twentieth Century electronic surveillance of conversations.

Nor is this all. Here the agent wired-for-sound was sent to take down petitioner's words, not by enforcement agents as in *Lopez,* but by two United States district judges. However serious the offenses of obstructing justice denounced by the section of which petitioner stands convicted, here the methods of detection used, where members of the bench have actually stepped down into the arena to track down offenders on their own, seem to us to involve an infinitely more serious impairment of the administration of justice, and one that is vastly more disturbing in its implications.

More than that, it is doubtful in the extreme whether petitioner's incautious—and admittedly im-

proper—remarks to an informer, who never had the slightest intention of acting on those remarks except to convey them to the F. B. I. and "make a case" against the petitioner, add up to a violation of the statute. Petitioner has already been grievously and severely punished for his indiscretions by disbarment from his chosen profession, in which he had previously been both successful and respected.[1] Now, however, he faces in addition three and a half years of penitentiary confinement.

All of the foregoing issues are intertwined in the present case, and we propose to show how, at critical junctures in the proceedings below, they were prejudicially confused. To that end we deal separately with the issues of search-and-seizure, judicial participation in the collection of evidence, entrapment and the content of the offense charged—in that order.

I. The Electronic Recording of Petitioner's Conversation Was Obtained in Violation of the Fourth and Fifth Amendments, and Should Therefore Have Been Excluded.

Here petitioner has specifically urged (Questions 2 and 3, Pet. 2; Pet. 16, 18) that the *Olmstead, On Lee,* and *Lopez* cases be squarely overruled, and that the carrying of a concealed recording device, of which a party is ignorant, in order to obtain statements from such party on which to institute a criminal prosecution, be held to constitute an unreasonable search and seizure in violation of the Fourth Amendment. Moreover (Question 2, Pet. 2), in addition to forfeiting his right

1. As a matter of possible interest, he participated in both arguments of *Baker v. Carr,* 366 U. S. 907, 369 U. S. 186, on behalf of the petitioners there.

of privacy, a person is thereby compelled to be a witness against himself, in violation of the Fifth Amendment, when incriminating conversations are secretly taken from him by a contrivance of modern science such as was used here to be played at his trial.

There is no need for us to lengthen the present brief with apt quotations from earlier opinions making the same point, the more so since all the relevant considerations have been so very recently canvassed and collected. *Lopez v. United States,* 373 U. S. 427, 446-471 (dissent). The view of the Fourth Amendment that we urge has had the support of many members of this Court, as the following enumeration will disclose:

Olmstead v. United States, 277 U. S. 438, 471 (Brandeis, J.), 485 (Butler, J.), 488 (Stone, J.).[2]

Goldman v. United States, 316 U. S. 129, 136 (Stone, C. J., and Frankfurter, J.), 136 (Murphy, J.).

On Lee v. United States, 343 U. S. 747, 758 (Frankfurter, J.), 762 (Douglas, J.), 765 (Burton, J.).

Lopez v. United States, 373 U. S. 427, 446 (Brennan, Douglas, and Goldberg, JJ.).

If it be necessary to distinguish the *Lopez* case, there is no difficulty: There the petitioner knew Davis to be a Federal officer. Here the petitioner had not the slightest inkling that Vick, whom he had employed in October 1963 at the latter's solicitation, had in fact been an informer reporting to the F. B. I. since February of the same year (*supra,* pp. 6-8).

Consequently, see *Lopez* at 437, Vick gained access with his recorder by misrepresentation, so that what

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2. Holmes, J., is not included; he said (p. 469): "While I do not deny it, I am not prepared to say that the penumbra of the Fourth and Fifth Amendments covers the defendant, although I fully agree that Courts are apt to err by sticking too closely to the words of a law where those words import a policy that goes beyond them."

was *recorded* was illegally seized; accordingly, *Gouled v. United States,* 255 U. S. 298, which was inapplicable there, governs the present case. In *Gouled* the Court said at pp. 305-306:

> "The prohibition of the Fourth Amendment is against all unreasonable searches and seizures and if for a Government officer to obtain entrance to a man's house or office by force or by an illegal threat or show of force, amounting to coercion, and then to search for and seize his private papers would be an unreasonable and therefore a prohibited search and seizure, as it certainly would be, it is impossible to successfully contend that a like search and seizure would be a reasonable one if only admission were obtained by stealth instead of by force or coercion. The security and privacy of the home or office and of the papers of the owner would be as much invaded and the search and seizure would be as much against his will in the one case as in the other, and it must therefore be regarded as equally in violation of his constitutional rights."

True, petitioner admitted Vick to his office, obviously Vick did not secretly enter without petitioner's permission, but petitioner did not admit Vick as a wired-for-sound informer *with a recorder* to secretly record their conversations.

We recognize that in *Lopez v. United States,* 373 U. S. at page 450, Justice Brennan with whom Justice Douglas and Justice Goldberg joined dissenting stated:

> "That is not to say that all communications are privileged. On Lee assumed the risk that his

acquaintance would divulge their conversation; Lopez assumed the same risk *vis-à-vis* Davis."

Petitioner may have assumed the risk that his conversations with Vick would be divulged—but not the risk that the conversations would be recorded. There is a great difference between an informer for the Government whose job is to *merely inform* and an informer who makes recordings of conversations that he instigates. The risk is as was stated in *Lopez* "of a different order."

". . . It is the risk that third parties, whether mechanical auditors like the Minifon or human transcribers of mechanical transmissions as in *On Lee*—third parties who cannot be shut out of a conversation as conventional eavesdroppers can be, merely by a lowering of voices, or withdrawing to a private place—may give independent evidence of any conversation. There is only one way to guard against such a risk, and that is to keep one's mouth shut on all occasions." 373 U. S. 450.

But perhaps the factor which should most incline to an overruling of the *Olmstead-On Lee-Lopez* doctrine is the use that was made of it here, where the hidden recorder was used, not at the instigation of law enforcement officers, but with the specific and affirmative approbation of two United States District Judges, who thus became active participants in the business of apprehending suspected offenders.

A doctrine that lends itself to such an extension cannot be sound. We submit it cannot be squared with the commands of the Constitution.

II. Even Under the *On Lee* and *Lopez* Cases as They Stand, the Recording Should Have Been Excluded Because It Was Obtained at the Direction of Two United States District Judges.

But even if the Court declines to overturn the *Olmstead* case and its subsequent reaffirmation in *On Lee* and *Lopez,* so that no constitutional question is involved, this recording should still be excluded, in the exercise of the Court's supervisory powers over the administration of justice: It is not for the judiciary to become partners with the F. B. I. in the detection of suspected wrongdoing.

First. Here the court below held the recording admissible on the basis of *Lopez,* of *On Lee,* and of cases in other circuits resting on those decisions. We do not, indeed we cannot, quarrel with that; in any lower Federal court those two decisions were plainly binding; and in the court below we put forward our present constitutional contention essentially to preserve petitioner's position in the event of affirmance.

But, citing *Lopez* and *On Lee,* the court below added a footnote (R. 56), as follows:

> "In view of the strong dissent in *Lopez* (see *Lopez v. United States,* 373 U. S. at 446) to the controlling rule described above, it may be relevant to note that the essentials of search warrant procedure were carried out in the instant case, albeit no statutory authority for such a warrant exists. These include appearance before a court, a showing of probable cause, a specific authorization for the search, including a description of method and object."

Whenever any essential link in an argument is thus dropped down from text to footnote, there has been flashed the infallible signal of untenable reasoning. Indeed, that suggestion, that what was done here could be equated with the issuance of a search warrant, is not only a wholly insufficient make-weight, it makes a mockery of the solemn procedure required by the Fourth Amendment.

For, quite apart from the admitted lack of statutory authority for a warrant in the present case, what was done here differed in two vital respects from recognized search warrant procedures.

1. When an officer of the law serves a warrant, he announces to all and sundry his possession of such a warrant before proceeding to execute that source of his authority. Here, very plainly, Vick never disclosed that he was a Government agent, much less that he was wired for sound. Consequently it is impossible to analogize the present situation to one where a search warrant has been issued. For search warrants are executed by persons who proclaim both their official status plus the additional *ad hoc* authority that the warrant confers upon them.

2. When a search warrant is duly issued by a court upon a showing of probable cause, the results of the search are retained by those charged with the enforcement of the law. Thereafter the fruits of that lawful search are presented to the grand jury, if an indictment is sought, or to the prosecutor, if the proceeding is by way of information.

In no instance involving use of a search warrant is the evidence obtained through execution of the warrant ever seen by the judge until it comes before him in due

course, either by motion to suppress, or by motion to dismiss the indictment, or in the course of the trial.

Here, however, the fruits of Vick's wiring-for-sound were immediately played back to the two judges, as though the judges themselves were part of the prosecutorial staff.

Second. Under the *On Lee* and *Lopez* cases, and they were law when Vick on three occasions carried a concealed recorder on his person into petitioner's office, such use was legal and constitutional, requiring no further approval from any source. The decoy in *On Lee* proceeded under orders from narcotic agents, the revenue agent in *Lopez* was acting under the orders of his immediate superiors in the Internal Revenue Service. Under the rule of those cases, therefore, and as long as they stood, the fruits of Vick's hidden device would have been admissible either if he had carried the recorder on his own, or if he had carried it at the suggestion or direction of the F. B. I. or of anyone else in the Department of Justice. Under those decisions, in short, no imprimatur of judicial approval was necessary as a prerequisite to the admissibility of the recording.

Third. It is important to distinguish here between the issue of illegally obtained evidence, which involves the admissibility of the recording, and the issue of entrapment, which involves the completely unrelated question whether petitioner was induced to do what he did because of the suggestions or solicitations of a Government agent.

The trial judge badly confused the two, saying (R. 560a), "This entrapment doctrine relates to evidence, the reception of illegal evidence."

Not so; the two are wholly distinct. Thus, in *Sorrells v. United States,* 287 U. S. 435, and again in *Sherman v. United States,* 356 U. S. 369, there was entrapment without the use of any recorder; while in *On Lee v. United States,* 343 U. S. 747, a recorder was used without the slightest suggestion of entrapment. Similarly, in *Lopez v. United States,* 373 U. S. 427, the primary issue concerned the use of the recorder, so much so that the defendant at the trial did not even request any instruction concerning entrapment.

Or, otherwise stated, there can be entrapment without the slightest suggestion that illegally obtained evidence infects the commission of the acts for which a defendant is prosecuted; and there can be a question concerning the propriety of using electronic recordings in a case that does not even remotely suggest entrapment.

We stress this fundamental differentiation because it was ignored, not only in the course of the trial at the point indicated (R. 560a, just quoted), not only in the improper admission of the prosecution's rebuttal evidence (Point IV, *infra,* pp. 46-51) and in the erroneous charge (Point IIIC, *infra,* pp. 44-50), but also in the improper injection of the judiciary into the search for crime conducted by the Department of Justice and the F. B. I.

Fourth. The Department of Justice overstepped proper limitations when, before its investigation had been completed, it informally showed the district judges in chambers the evidence it had already collected, and sought their approval for the next stage of investigation and for the placing of the recording device on their decoy, Vick.

The two district judges overstepped proper limitations when they associated themselves with the prose-

cuting and law enforcement officers by authorizing and approving this further investigative step.

As we have said (Pet. 16), here "members of the bench have actually stepped down into the arena to track down suspected offenders on their own." They are not excused, as the prosecution seeks to argue (Br. Op. 8), because "They did not then manifest any conviction that petitioner was guilty; indeed, their testimony indicates that they shared government counsel's skepticism as to the truth of Vick's allegations."

The vice was, not that they formed any views concerning petitioner's guilt or innocence, it was that they left the judicial bench to participate in, by authorizing further steps in, the investigation of petitioner's conduct.

This is more than an abstraction stemming from the doctrine of separation of powers, this goes to the very fundamentals of judicial conduct.

True, the present is not a situation where a judge has a pecuniary interest in the outcome of a trial (*Tumey v. Ohio,* 273 U. S. 510), or an emotional involvement (*Offutt v. United States,* 348 U. S. 11), or one where he has been first the accuser and then the Judge (*In Re Murchison,* 349 U. S. 133). Rather, the impropriety is inherent in the judges allying themselves with the prosecutory and investigatory agencies of the Government, in their participation in investigation, in their authorization of further investigatory steps.

We submit, therefore, that any evidence obtained by the prosecution in conformity with or pursuant to the judges' directions must be excluded for that reason. Consequently, even on the assumption that *On Lee* and *Lopez* were correctly decided, so that no constitutional question is involved, the recording obtained

by Vick must still be excluded, because it was the result of a step directed by the judges—who simply have no business becoming advisers to and partners of the prosecution.

Every lawyer who has ever practiced in small communities, or even in larger ones where there are but few judges, believes that the intangible against which it is well-nigh impossible to defend is the close contact between the United States Attorney and the United States District Judge. What is said and done is usually beyond possibility of proof; and even if it were not, the individual practitioner cannot realistically speaking take steps to combat or even to discourage this course of conduct.

Accordingly, this Court should rule, in the exercise of its supervisory powers, that evidence obtained by law enforcement officers of the United States at the direction and with the collaboration of United States judges is the fruit of improper judicial conduct, and therefore inadmissible. In this view the recording obtained by Vick should have been excluded at the trial quite apart from constitutional considerations.

III. The Entrapment Issue Was Erroneously Handled in Numerous Respects.

The entrapment issue was treated incorrectly below, in no less than three separate aspects.

A. The Issue of Entrapment Should Not Have Been Submitted to the Jury at All.

We propose to argue, on alternative grounds, that the issue of entrapment here should never have been submitted to the jury at all.

First. Here there was entrapment as a matter of law, an assertion fully borne out by careful study of this record.

To begin with, Vick is shown to have been a particularly loathsome specimen of that generally unappetizing character, the *agent provocateur.*

He admitted an earlier attempt to bribe a public official, a city councilman (R. 349a), and the prosecution did not, no doubt because it could not, seek to contradict his bad community reputation for truth and veracity (R. 600a-609a).

Much of Vick's cross-examination here demonstrated in detail how he offered to change his testimony regarding petitioner if only he were guaranteed a pension for himself plus an educational fund for his children, which in his aggregate came to a quarter of a million dollars (R. 300a-313a); his evidence shows how disappointed he was when that offer did not tempt his listeners (R. 345a-346a). Vick's engagement to help the F. B. I. in order to insure his own "clean bill of health" (R. 215a, 220a, 224a-225a) was limited to reporting "illegal activity" (R. 216a, 224a-226a), a limitation that understandably did not incline him to reporting merely innocent action.

Vick's uncontradicted testimony was that (R. 266a) "I was trying to find out what Mr. Osborn's intentions were and prove it, and make a case," and that he himself never had the slightest intention of ever approaching his cousin Elliott (R. 132a-133a, 135a, 136a, 140a, 263a).

Before Vick mentioned his cousin, petitioner had been meticulous in warning his investigators not to contact jurors personally (R. 460a, 462a, 508a, 596a-597a); it was only after Vick's mention of his cousin Elliott that petitioner was tempted.

It is entrapment, this Court has said, when criminal conduct is "the product of the *creative* activity of law enforcement officials." *Sherman v. United States,* 356 U. S. 369, 372; *Sorrells v. United States,* 287 U. S. 435, 441, 445. It is entrapment when "the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." *Sorrells* at 442. Otherwise phrased, "the Government cannot be permitted to contend that he is guilty of a crime where the government officials are the instigators of his conduct." *Sorrells* at 452. It is entrapment when "the Government plays on the weaknesses of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted." *Sherman* at 376.

We have precisely such a case of entrapment here, on the uncontradicted evidence of Vick himself. Vick offered to report as an informer in return for a "clean bill of health" from the F. B. I., and to be "protected from prosecution," and these two desires combined into what he frankly admitted on the stand was a fixed desire to "make a case" against petitioner.

On three separate occasions after Elliott's name had first been mentioned—on November 7, on November 8, and on November 11 when the concealed recorder finally worked, Vick went to petitioner and talked about his cousin Elliott, saying that Elliott was receptive. Just as a Stern or a Menuhin can by skillful manipulation of a horsehair bow evoke magnificent music out of a Stradivarius violin, so Vick by repeating his admittedly false accounts of non-existent conversations with Elliott, and by repeating equally false recitals of Elliott's susceptibility, was able to extract

language from petitioner in pursuance of his own plan "to find out what Mr. Osborn's intentions were and prove it, and make a case" (R. 266a).

If regard be had to whether a defendant had criminal proclivities for which the government agent simply offered him an opportunity, or whether, on the contrary, it was the efforts of the agent playing—and preying—upon the defendant to beguile him into committing an offense that but for the agent's suggestions he would never have attempted, this case, we submit, falls clearly into the second class. This case, accordingly, establishes entrapment as a matter of law.

When Vick told petitioner that a juror on the panel was his cousin, it was not simply a matter of factual reporting, it was—in Vick's own words—an instance of "trying to find out what Mr. Osborn's intentions were" (R. 265a). This is significant because it establishes well nigh conclusively that petitioner never expressed the slightest intention of tampering with jurors —the evidence is uncontradicted that petitioner strongly warned Vick and his other investigators against the slightest improprieties—until Vick told him that his cousin was on the panel. Unhappily petitioner succumbed to this entrapment.

We submit that the power of Government is abused when, instead of being used to prevent crime and lawlessness, it is as here employed to promote crime by tempting people to commit unlawful acts.

We do not believe it is necessary, nor would it be helpful, to undertake a review of the unfortunately increasing number of reported cases that turn on resolution of the question whether the notion of committing particular crimes originated with officers of the law, whether those who should be preventing and detecting crime are instead devoting their efforts to manufactur-

ing and suggesting and inviting its commission. All of those cases turn on their facts, and the inquiry in every instance is the same: Was the offense charged in fact "the product of the *creative* activity" of law enforcement agencies and their members.

We think that when attention is focused on that question here, it will appear beyond any troubling doubt that what petitioner was recorded to have said, was evoked by Vick's repeated harping on the double lie that he had spoken to Elliott and that Elliott was itching to get money for hanging the jury.

In that connection it is significant that the court below concentrated on the recorded conversation that was the last of the series dealing only glancingly with the numerous conversations preceding it (R. 61). This was plainly erroneous, inasmuch as the last conversation was simply "part of a course of conduct which was the product of the inducement" (*Sherman v. United States,* 356 U. S. 369, 374).

When regard is had to the progression of events, it is clear that what petitioner ultimately said was indeed "the product of the *creative* activity" of the informer Vick. In that sense the act for which petitioner was charged in the indictment and was convicted was the necessary, foreseeable, and proximate result of Vick's artfully conceived entrapment that beguiled petitioner "into committing crimes which he otherwise would not have attempted" (*Sherman,* 356 U. S. at 376), into uttering words for which he was indicted, and in respect of which he now stands convicted.

All this appeared from the uncontradicted testimony of the prosecution witness Vick himself, the man who undertook to "make a case" against petitioner. Accordingly, petitioner's motions for acquittal, made at the close of the prosecution's case (R. 435a-436a)

and renewed at the close of the entire case (R. 660a-661a) should have been granted.

Second. There is another and alternative road to the conclusion that the issue of entrapment here should not have been left to the jury.

That road requires rejection of the rationale of the Court in *Sherman v. United States,* 356 U. S. 369, which holds that entrapment is to be submitted to the jury in the light of the defendant's conduct and predisposition, and the adoption instead of the view set forth in the concurring opinion in that case (356 U. S. at 378-385), which leaves to the court as a matter of law the appraisal of the conduct of the police. For, as was there said (p. 384),

> "The power of government is abused and directed to an end for which it was not constituted when employed to promote rather than detect crime and to bring about the downfall of those who, left to themselves, might well have obeyed the law."

In this connection, we refer to a recent thoughtful and scholarly study, *"The Serpent Beguiled Me and I Did Eat"—the Constitutional Status of the Entrapment Defense,* 74 Yale L. J. 942.

B. Petitioner's Acquittal on Count Two Eliminates All Evidence of Previous Disposition on His Part.

Under the prevailing opinion in *Sherman,* where the emphasis is on the defendant's conduct rather than on that of the police, it is one of the essential elements of entrapment that the defendant had no predisposition to violate the law, and, contrariwise, that entrapment is not established if the defendant was engaged in similar crimes. The trial judge so charged (R. 697a), without objection on petitioner's part (R. 708a).

In this case, Count Two of the Indictment (R. 8a) charged commission of a similar offense, about a year earlier than the one of which petitioner was convicted (R. 7a), through one Beard, to approach the husband of juror Harrison. Considerable evidence bearing on that count was introduced at the trial. In addition, the prosecutors' closing arguments referred extensively to the Beard-Harrison matter as tending to show petitioner's criminal predisposition (R. 667a-670a, 673a-677a, 682a-684a).

Thus, in their view, and, it may well have been, in the view of the jury, petitioner could not have been entrapped because some of the evidence bearing on his actions respecting the matters alleged in Count Two, a year earlier, reflected either a previous disposition to violate the law or else his participation in similar crimes.

But, by their verdict, the jury acquitted petitioner on Count Two (R. 734a-735a), thus establishing that he did not approach Beard with reference to juror Harrison as there alleged:

This circumstance introduces a significant variant.

Of course it is hornbook law that, whenever intent is an element of the crime charged, evidence that the defendant committed similar offenses is admissible to prove intent. 2 Wigmore, *Evidence* (3d ed. 1940) §§ 300-370 ("Other Offenses or Similar Acts, as Evidence of Knowledge, Design, or Intent").

Suppose, however, that (as here) one of the earlier offenses introduced in evidence to show intent has gone to trial and has resulted in an acquittal; is the situation then different?

The court below thought not; it said (R. 66) that "We do not believe that the judge's refusal to

instruct that the jury could not consider the testimony pertaining to Count Two (in the event they rendered a Not Guilty verdict thereon) was error."

This is assertion, without more. Contrariwise, a recent and thoroughly reasoned case, *State v. Little,* 87 Ariz. 295, 350 P. 2d 756, holds that evidence of any prior offense which resulted in acquittal is inadmissible. We submit that, on principle, this decision is correct.

An acquittal, after all, is a judgment as between the prosecution and the defendant that he never committed the act charged. A second attempt to try the defendant on the ground that he was really guilty and that the first jury never clearly understood the case would, obviously, run afoul of double jeopardy. Why then should the prosecution be free to use any evidence tending to show the defendant's guilt on the first occasion (in respect of which he stands acquitted) in order to show a guilty predisposition on his part in respect of a second occasion?

Consequently, at the very least, petitioner is entitled to a new trial on Count One, in which no evidence of alleged criminal predisposition based on matters alleged in Count Two would be admissible, inasmuch as all such latter evidence related to a matter in respect of which he has been finally and irrevocably acquitted.

But we cannot forbear to say that this problem would not have arisen, and could not hereafter arise, if alleged predisposition were put to one side as urged in the concurring opinion in *Sherman v. United States,* 356 U. S. 369, 378, and if the trial court were to determine the issue of entrapment *vel non* as a matter of law in the light of the prosecution's conduct.

C. So Much of the Charge as Left the Jury to Determine Whether the Tape Recording Was Obtained by Lawful Means Constituted Plain Error Requiring Reversal, as That Was a Question of Law for the Trial Court.

In his charge on entrapment (R. 697a-698a), the judge concluded as follows (R. 698a):

> "If on the other hand, you find on the facts and circumstances of this case and on the instructions as here given you by the Court that the evidence aforesaid, including the tape recording, was obtained by lawful means, that is, that there was no unlawful entrapment, you will find this particular issue against the defendant and your verdict on Count One would be for the Government."

The trial judge also charged (R. 701a):

> "The Government further contends that on each occasion when Vick was equipped with the recorder, this was done with the specific approval of the Federal Judges of this District. Thereafter Robert Vick on November 11, 1963, and pursuant to the specific authorization of the Federal Judges, had a conversation with the defendant Osborn in which the proposed bribe to prospective juror Elliott was discussed."

There was no objection to the charge as given (R. 708a), but we think that the foregoing amounts to plain error within Rule 52(b), F. R. Crim. P.

Whether the recording was admissible was a pure question of law, with which the jury was not concerned, and which it was not competent to answer. Whether, on the other hand, there was unlawful entrapment,

was a question, essentially of fact, concerning the extent to which petitioner's acts were "the product of the *creative* activity of law-enforcement officials" (*Sherman v. United States,* 356 U. S. at 372), a question under that decision to be decided by a properly instructed jury. But that latter question, as we have already shown, was completely unrelated to the evidentiary issue posed by the wire recording.

By confusing the two issues in the first extract quoted from his charge, the trial judge made the issue of entrapment turn on whether the recording was lawfully obtained; and then, in the second extract, plainly indicated to the jury that it was—because, forsooth, it had been authorized by "the specific approval of the Federal Judges of this District."

This was not only plain error, it was glaring and palpable error, and error of such magnitude as to require reversal.

IV. It Was Prejudicial Error to Permit the Two Federal Judges to Testify on Rebuttal That They Had Authorized Sending Vick to Petitioner With a Concealed Recorder, and to Admit Vick's Affidavit.

We have already on several occasions adverted to the manner in which the trial judge confused the issue whether the recording was lawfully obtained by Vick's carrying of the concealed device—the question of admissibility—with the issue whether what petitioner did was the result of the creative activity of the Government's agent Vick, the wholly unrelated question of entrapment.

On rebuttal, however, these two issues were confused and combined to petitioner's utter prejudice. We shall restate the circumstances, point out the rules of

law that were thereby violated, and then show how such violations irrevocably prejudiced petitioner's case.

First. After the defense rested, the prosecution offered by way of rebuttal the testimony of the two United States District Judges for the Middle District of Tennessee, Judges Gray and Miller, such testimony to be confined "to the proposition of whether there was any entrapment" (R. 651a), the prosecutor saying that (R. 652a) he wanted "to show what information the Government had at the time the tape recording was authorized." Both judges testified over petitioner's objection (R. 651a, 652a, 655a-656a, 658a), and a motion to strike their testimony was denied (R. 661a-663a). There was also offered on rebuttal, and read to the jury, an affidavit by Vick (R. 653a-655a); this also was objected to (R. 653a, 655a), and although the prosecution was agreeable to a limiting instruction in respect of the affidavit (R. 662a), none was given.

Second. The judges testified to authorizing Vick to carry the recorder, and Vick's affidavit was offered and admitted to show what had been before the judges when such authorization was given (R. 651a-660a). Without repeating what we have already argued at length, none of this had the slightest bearing on the issue of entrapment. The recording had already been admitted (Govt. Ex. 12, R. 212a, 741a-749a), Vick had testified at great length concerning all of his conversations with petitioner (R. 191a-350a), and no contention of recent contrivance had been even whispered in respect of any of his testimony.

Plainly, therefore, nothing in the rebuttal testimony had the slightest bearing on the issue in respect of which it was offered, the issue of entrapment.

Third. Moreover, what the judges said was not rebuttal evidence because their authorization for Vick to carry a concealed device *was already in evidence for all purposes* (R. 383a-385a). Therefore, see 6 Wigmore, *Evidence* (3d ed. 1940) § 1873, "the usual rule will exclude *all evidence which has not been made necessary by the opponent's case in reply.*"

Fourth. Vick's affidavit, originally offered as part of the prosecution's case in chief after he had testified at length, was then excluded (R. 406a-408a). Whatever may have been the situation had Vick himself been called as a rebuttal witness subject to further cross-examination, whatever may have been the situation had the affidavit been offered to rebut a contention that Vick's trial testimony was a recent contrivance, here it was offered—and received—for the truth of the matter asserted, without even the limiting instruction that the prosecution was willing to accept (R. 662a). This, very obviously, was error; specifically, there is no support anywhere for the notion of the court below that the affidavit became automatically admissible simply because Vick had been contradicted (R. 65). 4 Wigmore, *Evidence* (3d ed. 1940) §§ 1122-1132; *United States v. Sherman,* 171 F. 2d 619, 622 (C. A. 2); *Mosson v. Liberty Fast Freight Co.,* 124 F. 2d 448, 450 (C. A. 2); *United States v. Toner,* 173 F. 2d 140, 142-143 (C. A. 3); *Schoppel v. United States,* 270 F. 2d 413, 417 (C. A. 4); *Mellon v. United States,* 170 F. 2d 583, 585 (C. A. 5); *Bartley v. United States,* 319 F. 2d 717, 719-720 (D. C. Cir.) (same rule with statutory basis).

Indeed, the untenable theory on which this affidavit was offered and received is underscored by the prosecution's indication that it represented "merely

the information upon which the government acted" (R. 662a). On that view, which quite ruled out rebutting recent contrivance, it was totally inadmissible for any purpose, since it simply repeated in writing what Vick had already said on the stand.

Fifth. It is impossible to brush off the rebuttal testimony, as the court below sought to do (R. 65), as a matter within the permissible limits of the trial judge's discretion, on a par with the prosecution witness Sheridan's supplemental testimony (R. 358a, 359a). For here the rebuttal testimony, actually irrelevant to any issue raised by the defense, was the blow that sealed petitioner's doom.

When the defense rested, the jury was dealing with a contest between petitioner, a professional man of reputation, and Vick, an untrustworthy and essentially slimy character. No doubt the prosecution recognized its dilemma, and so felt impelled to bring up its heaviest artillery. So they offered Judge Gray of the Middle District as a witness in his own courtroom (R. 651a) to say that he had authorized the tape and the investigation "to determine whether it was true or false" (R. 657a). He pronounced his deep concern, and acknowledged that the prosecutors had earlier told him they did not believe the charge (R. 658a).

Next, Chief Judge Miller was brought to the stand to acknowledge his part in the matter, and to say (R. 659a-660a):

> "The affidavit contained information which reflected seriously upon a member of the bar of this court, who had practiced in my court ever since I have been on the bench. I decided that some action had to be taken to determine whether this information was correct or whether it was false.

It was the most serious problem that I have had to deal with since I have been on the bench.

"I could not sweep it under the rug.

"So I therefore decided that the best course to take was to allow a tape recorder to be used which would either clear this man or would prove that he was guilty. So I did authorize it.

* * *

"I said on that second occasion the same as I did on the first occasion: that the tape recorder should be used under proper surveillance, supervision, to see that it was not faked in any way, and to take every precaution to determine that it was used in a fair manner, so that we could get at the bottom of it and determine what the truth was."

Plainly, this was not rebuttal testimony. This was opinion evidence by judges (who earlier had already doffed the judicial robe and pinned on the policeman's badge) that in their opinion petitioner had been proved guilty. The details of the judges' earlier hearings to inquire into petitioner's conduct had already been spread at length on the record (R. 371a-434a). The fact that they had disbarred petitioner was made known to the jury (R. 510a). Now they testified once more, not on any issue raised by the defense, not on any issue properly before the jury, but only to advise the jury that they as judges who had disbarred petitioner were convinced of petitioner's guilt. The integrity of the truth determining process at trial was thereby undermined.

We have shown that, as a matter of unquestioned law, the judges' rebuttal testimony was incompetent. But even if a stronger case could be made for the competence of that testimony than the rules of evi-

dence justify, it should still have been excluded. For, as Mr. Justice Cardozo said for the Court in *Shepard v. United States,* 290 U. S. 96, 104:

> "Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown all weaker sounds. It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed. They have their source very often in considerations of administrative convenience, of practical expediency, and not in rules of logic. When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out. Thayer, Preliminary Treatise on the Law of Evidence, 266, 516; Wigmore, *Evidence,* §§ 1421, 1422, 1714."

V. Inasmuch as Vick Never Had the Slightest Intention of Approaching His Cousin Elliott, Nothing That Petitioner Said to Vick Amounted to a Violation of 18 U. S. C. § 1503.

Finally, the undisputed testimony of the informer Vick makes it plain that, under currently accepted principles of criminal law, petitioner committed no offense.

First. Vick, who was spying unbeknownst (R. 139a, 450a, 456a, 457a, 463a) on the employer from whom he had solicited work on a representation of financial need (R. 129a, 220a-221a, 225a, 259a, 260a, 273a), never had the slightest intention of seeing or talking to or approaching his cousin, the jury panel member Elliott, along the lines that after numerous interviews petitioner was stimulated to suggest (R. 132a, 135a, 138a, 139a-140a, 260a-263a, 265a).

Consequently here the "approach" was solicited by an informer who had determined in advance that he would never go near his cousin who was on the jury panel, and who indeed was in constant touch with the Department of Justice both *before* and after his meetings with petitioner.

That being so, all that was involved here on petitioner's part was guilty intent. So far as the effect on any member of the jury panel was concerned, so far as any approach to a juror was concerned, petitioner might with equal effect on the administration of justice have talked to a wall in his law office. If that wall indeed had been wired for sound, as indubitably the informer Vick was, the two situations would have been identical.

Second. Accordingly, this case is identical with those that hold that impossibility precludes conviction for criminal attempt, whether such impossibility be legal or factual.

Examples of the first category are cases holding that when a person accepts goods that he believes to have been stolen but that were not then stolen goods, he cannot be convicted of an attempt to receive stolen goods (*People v. Jaffe,* 185 N. Y. 497, 78 N. E. 169; *Booth v. State,* 398 P. 2d 863 (Okla. Cr.)); that it is not an attempt to commit a forgery where the instrument in question is void on its face and so cannot possibly operate to the prejudice of another (*Wilson v. State,* 85 Miss. 687, 38 So. 46); that an official who contracted a debt that was unauthorized and a nullity, but which he believed to be valid, can not be convicted of attempting illegally to contract a valid debt (*Marley v. State,* 58 N. J. L. 207, 33 Atl. 208); and that it is not an attempt to suborn perjury when the testimony

in question would not have been material and so could not have amounted to perjury (*People v. Teale,* 196 N. Y. 372, 89 N. E. 1086).

Examples of factual impossibility are decisions holding that it is not an attempt to commit murder when the prisoner discharges a pistol without a priming mechanism (*Regina v. Gamble,* 10 Cox C. C. 545); that it is not an attempt to poison when the substance used is non-poisonous (*State v. Clarissa,* 11 Ala. 57); that it is not an attempt to shoot deer out of season when the hunter shoots at a stuffed deer believing it to be alive (*State v. Guffey,* 262 S. W. 2d 152 (Mo. App.)); and that it is not an attempt to bribe a juror when the person believed to be a juror was not one in fact (*State v. Taylor,* 345 Mo. 325, 133 S. W. 2d 366).

Consequently, as the Ninth Circuit has held (*Ethridge v. United States,* 258 F. 2d 234), it is not an offense under 18 U. S. C. § 1503, the statute here in question, to solicit money from a convicted person to make arrangements that he shall be put on probation, where the one soliciting has not the slightest intention of ever approaching anyone once he has his hands on the money. The Ninth Circuit said (258 F. 2d at 236):

> "Our conclusion is that the only 'endeavor' in this case was the unilateral and futile effort of appellant to extract some 'easy money' from Walters. All that the evidence shows is that appellant 'suggested' to Walters that if the latter paid appellant the amount of money he solicited he (appellant) would undertake to do the things mentioned in the indictment. Aside from this there is a total absence in the government's proof or in the averments in the indictment that appel-

lant ever did, or ever intended (even if the solicited money was paid to him) to write to, personally contact, or try to contact, *any person* (official or otherwise) who at any time had any connection whatever with the prosecution of Walters."

Here, likewise, since Vick never had the slightest intention—by his own testimony (R. 132a, 135a, 138a-140a, 260a)—of ever talking to or getting in touch with Elliott, no violation of § 1503 took place.

Third. United States v. Russell, 255 U. S. 138, is not to the contrary. There the defendant in error, whose demurrer to the indictment had been sustained below, argued that since the approach charged had been to a juror's wife, who might or might not have been susceptible to contacting her husband who was on the jury, there had been no attempt, but only solicitation. His argument ran as follows (255 U. S. at 139-140):

"To constitute an 'attempt' or 'endeavor' to influence a juror, it is necessary to show, not only that that was the defendant's purpose, but that he performed some acts beyond mere preparation which would 'amount to the commencement of the consummation.' We have only an unaccepted solicitation of a third person to ascertain a juror's attitude towards men held for trial; if we are to assume that the defendant here had in mind, upon receiving information that the juror was not hostile to the men about to be placed on trial, to 'corruptly endeavor to influence' such juror, his conduct amounted to nothing but preparation for the 'endeavor.' Between the two—preparation for the endeavor and the endeavor itself to influence a juror—there is a wide difference."

The Government argued in reply (Br. for Pl. in E. 18) that "the statute uses the word 'endeavor,' and while one of the synonyms of this word is 'attempt,' it nevertheless has a shade of meaning more favorable to the earlier stage in the causal series than 'attempt.' "

It was in the context of those conflicting contentions that the Court said (255 U. S. at 143) that "The word of the section is 'endeavor,' and by using it the section got rid of the technicalities which might be urged as besetting the word 'attempt,' and it describes any effort or essay to accomplish the evil purpose that the section was enacted to prevent."

Nothing in the *Russell* case involved the asserted defense of impossibility, and accordingly the language of the *Russell* opinion, on familiar principles, has no application to that defense. Consequently, the reliance on that decision on the part of the court below, in answer to the present contention (R. 58), was misplaced—and unavailing.

It is true that talking desire to reach a juror to a blank wall may well be, literally, an "endeavor" within the statutory language, even though as a matter of settled criminal law it could not constitute an attempt because of the factor of impossibility. Talking similar desire to a person who has predetermined not to go near the particular juror, it is submitted, comes no closer to accomplishing what the statute forbids.

Fourth. The prosecution's contentions under the present heading do not meet the issue, since none of the decisions on which it relies (Br. Op. 11-12) deals with impossibility.

The *Russell* case plainly does not, for reasons already outlined. Nor do *Caldwell v. United States,* 218 F. 2d 370 (D. C. Cir.), certiorari denied, 349 U. S.

930, or *Knight v. United States,* 310 F. 2d 305 (C. A. 5), which simply hold that the endeavor need not succeed in order to constitute a violation of § 1503.

Of course not; if the endeavor had succeeded, if money had actually been offered or paid a juror, then the offense would not have been merely an endeavor under § 1503 but the completed offense under 18 U. S. C. § 206. Petitioner's point is, not that the endeavor did not succeed, *but that it could not possibly have succeeded.* And none of the authorities cited by the prosecution consider that question.

Nor were the prosecution's contentions below much more relevant. There it argued (Appellee's Br. 24, note 8) that "the modern tendency would be to hold responsible a person who purposely engages in conduct which would constitute a crime if the attendant circumstances were as he believes them to be," citing *inter alia* the American Law Institute's *Model Penal Code,* § 5.01(1)(a), and Wechsler et al., *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy,* 61 Col. L. Rev. 571.

Here again, the footnote signals flawed and evasive reasoning. The "modern tendency" that the prosecution invoked was not the trend of judicial decision, it was a legislative proposal designed to change the law that has yet to be adopted.

Thus, § 501(1)(a) of the Model Penal Code, see 61 Col. L. Rev. at 573, proposes to provide that a person is guilty of an attempt if he "purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be." And its sponsors frankly say—far more candidly than said by the prosecution's footnote in the court below—

that "The purpose of paragraph 1(a) is to eliminate legal impossibility as a defense to an attempt charge" (61 Col. L. Rev. at 578).

We will not debate whether impossibility as a defense to a charge of criminal attempt should be legislatively eliminated. The Oklahoma court in *Booth v. State,* 398 P. 2d 863, 872, thought that it should be—but gave that defense full effect as the law stood.

It is sufficient here to say that, under principles of criminal law that are generally accepted, impossibility is still a defense to a charge of criminal attempt; that nothing in *United States v. Russell,* 255 U. S. 138, deals with impossibility as a defense to a charge of endeavor under 18 U. S. C. § 1503; and that *Ethridge v. United States,* 258 F. 2d 234 (C. A. 9), recognizes impossibility as a defense under that provision.

Accordingly, it follows that petitioner did not violate the statute when he spoke to an informer who had predetermined to take no action in consequence of those words except to "make a case."

It necessarily follows, therefore, that the indictment must be dismissed.

CONCLUSION.

For the foregoing reasons, the judgment below should be reversed, with directions to dismiss the indictment, or, at the very least, to grant petitioner a new trial.

Respectfully submitted,

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